IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 22ND FEBRUARY 2007 / 3RD PHALGUNA 1928

RSA.No. 837 of 2006()

A.S.310/2001 OF I ADDITIONAL DISTRICT JUDGE, THRISSUR
O.S.205/95 OF MUNSIFF COURT, WADAKANCHERY

APPELLANT/APPELLANT/6TH DEFENDANT.

SAJEEV, AGED 26 YEARS,
S/O. LATE KARUNAN, OZHUKAYIL HOUSE, VHELAKKARA VILLAGE, THALAPPILLY TALUK.

BY ADV. SRI.P.VIJAYA BHANU

RESPONDENTS/RESPONDENTS/PLAINTIFF.

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1. RAJAMANI C.K., AGED 62,
S/O. KANDAMANI CHETTIAR, CHELAKKARA VILLAGE, DESOM, THALAPPILLY TALUK.

2. CHACKOCHAN, AGED 45 ,
S/O. NEYYAN VARATHAPPAN, CHELAKKARA VILLAGE,DESOM.

3. SANTHA, AGED 55,
W/O. DECEASED KUMARAN, OZHUKAYIL HOUSE, CHELAKKARA VILLAGE, THALAPPILLY TALUK.

4. PUSHPAN, AGED 34, S/O. LATE KARUNAN & 3RD RESPONDENT SANTHA, OZHUKAYIL HOUSE, CHELAKKARA VILLAGE, THALAPPILLY TALUK.

5. SREEJA UNNIKRISHNAN, AGED 29,
D/O. LATE KARUNAN & 3RD RESPONDENT SANTHA, OZHUKAYIL HOUSE, CHELAKKARA VILLAGE, THALAPPILLY TALUK.

6. DIVYA, AGED 20,
D/O. LATE KARUNAN & 3RD RESPONDENT SANTHA, OZHUKAYIL HOUSE, CHELAKKARA VILLAGE, THALAPPILLY TALUK.

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 22/02/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON I.A.NO. 2097/06 IN RSA 837/06

DISMISSED

22/2/2007

SD/-M.SASIDHARAN NAMBIAR,JUDGE.

//True copy//

PA to Judge.

M.SASIDHARAN NAMBIAR,J.

R.S.A .NO.837 OF 2006

Dated 22nd February 2007

J U D G M E N T

Sixth defendant who was impleaded as one of the legal heirs of deceased defendant in O.S.205/95 on the file of Munsiff court, Wadakanchery is the appellant. First respondent is the plaintiff and other respondents are other defendants in the suit. First respondent filed suit for recovery of possession of plaint C schedule property on the strength of his title. Case of respondent was that plaint A schedule property originally belonged to his father Kanthaswami Chettiyar under Exts.A1 to A4 and father executed Ext.X1 will whereunder plaint A schedule property was bequeathed to first respondent and therefore he has title to the property. It is contended that plaint B schedule property is a go-down building in the plaint A schedule property. C schedule property is the property beneath the western eaves of plaint B schedule building. Case of defendants was that property which lies to the west of plaint A schedule

property originally belonged to Ashtamoorthy which was sold under Ext.B3 to Jolly who in turn sold it to first defendant and from first defendant it was purchased by second defendant under Ext.B2 and plaint C schedule property is part of said property and first respondent has no title to the property. Learned Munsiff framed necessary issues. On the side of first respondent Exts.A1 to A9 and X1 were marked and Pws.1 and 2 were examined. On the side of defendants, Exts.B1 to B7 were marked and Dws.1 and 2 were examined. Exts.C1 and C2 reports prepared by Commissioner were also marked. Learned Munsiff on the evidence found that plaint C schedule property is part of plaint A schedule property which originally belonged to father of first respondent under Exts.A1 to A4 and under Ext.X1 will first respondent has title to the property and appellant or other defendants have no manner of title or right over the same and therefore first respondent is entitled to the decree sought for. Suit was decreed declaring the title of first respondent to plaint C schedule property and to recover possession of same after demolishing the structure constructed therein by defendants.

2. Appellants challenged decree and judgment before District court, Thrissur in A.S.310/2001. Learned

Additional District Judge after re-appreciation of evidence confirmed the decree and judgment and dismissed the appeal. It is challenged in this second appeal.

3. Learned counsel appearing for appellant was heard.

4. Argument of learned counsel appearing for appellant was that first respondent is claiming title to Ext.X1 will and the will was not proved as provided under Sections 68 of Indian Evidence Act and Section 63 of Indian Succession Act and only PW1 son of attestor was examined and his evidence is insufficient to prove the execution of the will and therefore first respondent did not establish the title and courts below did not properly appreciate this aspect and therefore decree is unsustainable. It was also argued that property belonging to first respondent is only in survey No.349 and plaint C schedule property is in survey No.293 and therefore first respondent cannot claim any right or title to plaint C schedule property and therefore decree is unsustainable.

5. Ext.X1 will is a registered will and was got summoned from the Registrar's office and marked before the court below. Evidence of PW1 establish that attesting witness to Ext.X1, is his father is no more. PW1 identified the signature of his father and courts below

accepted it as sufficient evidence to prove execution of the will.

6. In the facts and circumstances of the case, I do not find that further formal proof of Ext.X1 will is necessary. Property admittedly belongs to the father. Even if father died without a testament, property would devolve upon his legal heirs including first respondent son. Fact that first respondent is a co-owner cannot be disputed. A co-owner is definitely entitled to seek recovery of possession of property from a third party and therefore in the circumstances of this case, only a formal proof of will is necessary. Will was registered and was deposited with Sub Registrar and got summoned and produced. Evidence of PW1 establish the genuineness of the will. Ext.X1 establish title of first respondent to plaint A schedule property. Learned Munsiff and learned District Judge after appreciation of evidence found that though survey number shown in Exts.A1 to A4 is only survey No.349 and plaint C schedule property which forms part of survey No.293 forms part of the property which belonged to father of first respondent under Exts.A1 to A4. That factual finding cannot be interfered in exercise of powers of this court under Section 100 of Code of Civil Procedure. As first respondent has title to

plaint A schedule property and plaint C schedule property forms part of plaint A schedule property and appellant or other respondents have no better title and as title of first respondent is not barred by adverse possession and limitation, first respondent is entitled to the decree granted by courts below. No substantial question of law is involved in this appeal.

Appeal is dismissed.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.